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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 416

THORVOLD REPSHOLDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law entered by the United States District Court for the Northern District of Illinois are unreported. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 205 F. 2d 852.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1953. A motion for rehearing filed on July 23, 1953, was denied on September 8,

1953. The petition for a writ of certiorari was filed on October 15, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether any negligence on the part of respondent proximately caused an injury to petitioner's knee for which recovery may be had under the Jones Act.

2. Whether petitioner may recover maintenance and cure for a minor and temporary injury which he failed to report, for which he sought no hospitalization although free marine hospitalization was readily available, and which was treated at no expense to him.

3. Whether any action of the trial court or of the Court of Appeals denied petitioner due process of law.

STATEMENT

Petitioner, Thorvold Repsholdt, an experienced seaman, made a coastwise voyage in 1948 as first cook upon the government operated tanker *Fort Stephenson* (Tr. 80, 91).[1] Repsholdt occupied an outside cabin by himself (Tr. 86). During the evening of March 4, 1948, the weather became rough and a northeasterly sea brought heavy swells and shipped seas over the main deck of the *Fort Stephenson* (Dep. of Thomas, pp. 8, 11; Log of Ship

[1] There is no printed record in this case. Petitioner, as a seaman, is proceeding under 28 U.S.C. 1916, and asserts that he is without funds to print the record. Accordingly, reference is made herein to the various documents, not numbered consecutively, which make up the record.

attached to Respondent's Answer to Interrogatories).

Petitioner knew that squalls and rolly waves were in progress (Tr. 89). He was off duty that evening and about 11 p. m. was in the mess hall watching a card game and having coffee (Tr. 92). Thereafter, he went to the quarters of the night cook to visit (Tr. 93). In about half an hour someone told him that his cabin deck was flooded (Tr. 93). He then went to his cabin and found it flooded with about six inches of water (Tr. 93). Water entered petitioner's cabin through the porthole which had been left open and its cover unsecured (Tr. 63, 94). Petitioner and a fellow seaman named Sloane then entered the cabin to retrieve petitioner's gear and bail the water out. Petitioner slipped, fell forward and landed on his right knee (Tr. 94, 95), and thereafter went to the galley and allegedly slipped on the companionway steps, although the companionway was equipped with handrails on either side (Tr. 99, 146). Petitioner stated "I bruised my knee the third time—the second time" (Tr. 99), and "I imagine I hurt myself a little" (Tr. 150).[2]

When the *Fort Stephenson* arrived in Provi-

[2] Petitioner told a different story to his own physician and also in giving his medical history to Veterans Administration doctors after he had sustained a fall on April 19, 1948, which fractured his right patella (Tr. 11, 189-191). He then stated that he had been on a tanker the front of which blew up and that he ran up on deck, slipped twice and injured his right knee (Tr. 33, 190). According to this medical history petitioner was able to continue working and in two weeks his knee was apparently normal (Tr. 33). At the trial of this cause, petitioner admitted that there was no explosion on board the tanker (Tr. 166).

dence, Rhode Island, petitioner asked to quit and gave no reason therefor (Dep. of Thomas, p. 5). Petitioner testified that the morning following the alleged injury he went to the mess hall and showed his knee to the captain and the purser (Tr. 101). This is the same knee which petitioner testified had swollen to ten inches in diameter (Tr. 151). On the other hand, the captain testified that petitioner did not report any injury whatsoever and that he did not observe any change in petitioner's appearance when he was paid off in the mess hall on March 6, 1948 (Dep. of Thomas, pp. 5, 6). The mate testified that he saw petitioner when he was paid off and that he walked all right and appeared to be no different then than at any other time (Dep. of Serenius, p. 23). The second cook testified that petitioner did not "report" any accident or injury to him, that there was no accident aboard and that he did not see any swollen leg (Dep. of Pollard, pp. 6, 7).

Petitioner, on leaving the *Fort Stephenson,* proceeded to his home in Oshkosh, Wisconsin, by train. changing trains in New York, Chicago and Milwaukee (Tr. 152, 154, 155, 157, 158). He asked for no hospital ticket on leaving the tanker and he did not report to any of the marine hospitals available to him at Providence, New York City, Chicago or Milwaukee, although he knew that free medical attention was there available (Tr. 152, 154).[3] The

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[3] Petitioner claimed that he telephoned the Marine Hospital Clinic in New York on Sunday but that no one answered (Tr. 155). However, he admitted that the Marine Hospital was

injuries later sustained by petitioner on April 19, 1948, were treated by the Veterans Administration at no expense to petitioner (Tr. 112).

In November 1949, petitioner filed a libel in the United States District Court for the Northern District of Illinois claiming damages under the Jones Act for injuries allegedly received on the *Fort Stephenson* in March 1948. A claim for maintenance and cure was the subject of the second cause stated in petitioner's libel. Libellant alleged, among other things, that the respondent was negligent in allowing the portholes of the *Fort Stephenson* to remain open and in not notifying petitioner in advance that the vessel was headed into a storm. Respondent's answer and exceptions set forth that the petitioner signed off the *Fort Stephenson* on March 6, 1948, at Providence, Rhode Island, without having reported or made any claim for injury, denied

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open twenty-four hours a day every day (Tr. 169, 170). Petitioner first testified that he had seen a Doctor Pfefferkorn in Oshkosh shortly after his return (Tr. 160), but the doctor denied this in a statement (Tr. 190) and petitioner then testified he did not see Doctor Pfefferkorn until *after* he had fallen on the back steps of his house on April 19, 1948, more than a month after he returned home (Tr. 162). Petitioner also testified that he went to Milwaukee to see a doctor at the United States Public Health Service Clinic and that the doctor prescribed pills and hot applications (Tr. 110, 159, 163-164). A search of the records of the United States Public Health Service Clinic at Milwaukee failed to disclose any record of a visit by petitioner (Tr. 57). Petitioner's testimony in regard to this visit is confusing inasmuch as he also testified that he "stayed there [Oshkosh] until the 19th of April when my leg broke" (Tr. 158). The medical history given Veterans Administration doctors by petitioner subsequent to his injury on April 19, 1948, recites "History of injury to knee in March 1948, X-rays negative at the time" (Tr. 47).

that he was injured, and further denied any negligence on the part of the Government or its agents.

Subsequent to filing suit, petitioner took a Civil Service examination and, in October 1950, obtained full time employment with the Veterans Administration Hospital at Wood, Wisconsin (Tr. 119). On his way to work one day, in February 1951, he slipped on an icy sidewalk at the hospital and broke his right leg (Tr. 18, 168). He has since been receiving disability benefit payments of $119.00 per month under the Federal Employees' Compensation Act on account of the injuries sustained in that fall (Tr. 121).

On March 5, 1951, petitioner amended his libel to allege, among other things, the negligence of respondent in failing to provide adequate and proper drainage facilities in petitioner's cabin on the *Fort Stephenson*. Respondent denied the additional allegations.

The District Court found that, although petitioner's testimony was vague and contradictory, he had sustained an injury of minor and temporary character aboard the *Fort Stephenson;* that there was no causal connection between the injury on the tanker and the subsequent falls sustained by petitioner; that the vessel did not have scuppers or drains in the cabin which petitioner occupied; and that such drains were required by law. The District Court, however, held that it was *petitioner's* duty to keep the porthole in his sleeping quarters

closed in rough weather[4] and that petitioner was guilty of contributory negligence in failing to close his porthole, thus permitting water to enter his cabin. Although respondent did not warn petitioner that the weather was rough, the District Court found that petitioner was an experienced seaman and there was no duty or reason to warn him. Petitioner was awarded $1,000 damages under the Jones Act and $600 for maintenance and cure.

Cross appeals were taken by both parties from the judgment. The United States Court of Appeals for the Seventh Circuit concurred in the finding of the District Court that there was no causal connection between the petitioner's injury on the *Fort Stephenson* and his subsequent falls of April 19, 1948, and February 1951. The Court of Appeals further held that it was petitioner's duty to close the portholes in his cabin and that, had the porthole cover been closed and fastened, the cabin would not have been flooded and he would not have been in-

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[4] The captain of the tanker testified that such portholes were for the use of the crew and it was assumed that they would close them in bad weather (Dep. of Thomas, p. 16). The second cook testified that every crew member was responsible for his own quarters and was supposed "to go look" (Dep. of Pollard, pp. 18-19). Petitioner at first testified that early in his sailing career it was the sailor's duty to close the portholes in his cabin but that this rule had been changed (Tr. 90). However, he subsequently admitted that it was his duty to close the portholes in his quarters (Tr. 143, 144). Petitioner's witness Sloane stated that common sense told him to keep the portholes closed (Tr. 72). Petitioner's witness Noal at first testified that it was the duty of the mate on watch to close the portholes (Tr. 175). Subsequently, he admitted that a seaman knows when the weather is rough without being told, that he knew enough to secure his own porthole, and that it was his duty to do so (Tr. 179-180).

jured. The absence of scuppers in each individual cabin was held not to be a proximate cause of petitioner's injury and the court found no negligence on the part of respondent proximately causing injury to petitioner. The court further found that petitioner had much experience in obtaining medical aid in Marine hospitals; that he failed to act with reasonable diligence to find out what was really the matter with him and secure treatment; and that under the facts of this case he was not entitled to maintenance and cure. Accordingly, it reversed the judgment of the District Court.

ARGUMENT

Petitioner seeks to bring before this Court for review a decision which correctly resolves the essentially factual issues in favor of respondent. Contrary to the contentions of petitioner, no conflict is presented, and the case involves no question of general legal importance meriting review by this Court. Petitioner has not been denied due process of law nor does this case call for the exercise of this Court's power of supervision with regard to the judicial procedures employed in the courts below.

1. Petitioner has failed to establish that any negligence on the part of respondent or its agents proximately caused any injury to petitioner.[5] Peti-

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[5] The basis for determining liability is found in Section 1 of the Federal Employers' Liability Act, 35 Stat. 65, 45 U.S.C. 51, made applicable by the Jones Act. Section 33, Merchant Marine Act of 1920, 41 Stat. 1007, 46 U.S.C. 688. Damages are recoverable only for negligence (*De Zon* v. *American President Lines*, 318 U.S. 660, 671) and the negligence claimed must be

tioner's fall in his cabin was directly due to his own negligence in failing to close the porthole in his cabin when he knew a northeaster was in progress, bringing rain squalls and heavy seas. The evidence overwhelmingly shows that it was his duty to close the porthole and not that of respondent or its agents, and both courts below so found.[6] Petitioner cannot challenge that two-court finding here. *Comstock* v. *Group of Institutional Investors,* 335 U. S. 211, 213-214.

The court below properly held that the absence of a scupper or drain in petitioner's cabin was not a proximate cause of his injury. The presence of a drain could not have prevented the entry of water through the open porthole nor its sloshing back and forth across the cabin floor with the roll of the ship. The floor and petitioner's shoes would have been slippery in any event.[7] Both courts below were in agreement that respondent was under no duty to

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the proximate cause of the injury. *Jackson* v. *Pittsburgh S. S. Co.,* 131 F. 2d 668, 669 (C.A. 6); *Ryan* v. *United States,* 150 F. 2d 366, 368 (C.A. 3).

[6] The case of *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.,* 191 F. 2d 82 (C.A. 7), certiorari denied, 342 U.S. 888, cited by petitioner, does not hold otherwise. The injured deckhand in that case had been assigned the responsibility of closing the hatches and doors of a tug in heavy weather. The tug did not have private cabins with portholes and the closing of such portholes was not in issue. In the *Mullen* case, as in the instant case, the claimant's injury was due to his own negligence and not that of the shipowner.

[7] Petitioner's subsequent fall on the companionway stairs was likewise attributed by him to the slippage of his shoes which were wet by the water entering his cabin through the porthole (Tr. 99). His failure to use the handrails provided for his safety on either side of the companionway was, no doubt, a contributing cause to this fall.

warn petitioner, an experienced seaman, of the approach of a storm. In the absence of proof that any negligence on the part of respondent proximately caused any injury to petitioner the court below correctly denied recovery under the Jones Act.[8]

2. Petitioner is not entitled to maintenance and cure under the circumstances of this case. He was not deprived of subsistence by any inability to work.[9] Rather, he voluntarily quit his job without giving any reason therefor; he simply went home to visit his family. Moreover, petitioner has not shown the expenditure by him of any funds which may properly be attributed to his claimed injury aboard the *Fort Stephenson*.[10] Since petitioner was not de-

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[8] Contrary to the contention of petitioner, the court below did not rely upon the defense of assumption of risk. The court does quote from the case of *Roberts* v. *United Fisheries Vessels Co.*, 141 F. 2d 288, 293 (C.A. 1), certiorari denied, 323 U.S. 753, which held that, while the defense of assumption of risk is not available under the Jones Act, that Act does not shift the usual and ordinary risks of the calling to the employer if he is otherwise without fault. See also *Lake* v. *Standard Fruit & Steamship Co.*, 185 F. 2d 354, 356 (C.A. 2).

[9] The superficial character of the claimed injury is shown in that responsible witnesses testified that petitioner reported no injury on board the vessel; that he walked through the pay line and they observed no change in his appearance; and that he asked for no hospital ticket. Petitioner by his own admission rode trains from Providence, Rhode Island to Wisconsin and visited none of the marine hospitals in any of the cities where he changed trains, although he knew that free medical care was available to him there. The medical history subsequently given Veterans Administration doctors was that X-rays of petitioner's right knee were negative; that he was able to continue working; and, that in two weeks his knee was apparently normal.

[10] The District Court accepted petitioner's testimony that he remained at home until after he was again injured on April

prived of subsistence and he incurred no medical expenses attributable to the injury of March 4, 1948, he was properly denied maintenance and cure by the court below. *Johnson* v. *United States,* 333 U. S. 46, 50; *Field* v. *Waterman S. S. Corp.,* 104 F. 2d 849, 851 (C.A. 5).

The denial of maintenance and cure is further supported by the finding that petitioner failed to act with reasonable diligence to find out what was wrong and to secure treatment. *Bowers* v. *Seas Shipping Co., Inc.,* 185 F. 2d 352 (C.A. 4). Petitioner knew that free medical attention and hospitalization were available to him. A seaman who neglects to make use of hospital treatment available to him or who declines hospital treatment calculated to improve his condition may not obtain an award of maintenance and cure at his employer's expense. *Bailey* v. *City of New York,* 55 F. Supp. 699, 703 (S.D. N.Y.), affirmed, 153 F. 2d 427 (C.A. 2). An offer of hospitalization in a Marine hospital fully discharges the obligation to furnish maintenance and cure and a seaman's refusal to accept treatment

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19, 1948. Even if petitioner visited the United States Public Health Service Clinic at Milwaukee as claimed (see fn. 3, *supra,* pp. 4-5), it appears that the pills prescribed were given to him and that the home remedy of hot applications cost him nothing. Any expenditures made for medical care subsequent to April 19, 1948, would be attributable to the intervening injury of that date, or the subsequent injury of February 1951, which both courts below concluded had no causal connection with the first injury. Under settled principles the concurrent findings of these two courts should be accorded controlling weight. See *supra,* p. 9. In any event, it appears that subsequent to April 19, 1948, petitioner was hospitalized without expense to himself by the Veterans Administration and that he has drawn $119 per month in federal employees compensation since his most recent injury.

therein waives all further rights against his employer. *June* v. *Pan-American Petroleum & Transport Co.*, 25 F. 2d 457, 458 (C.A. 5); *The Saguache*, 112 F. 2d 482, 483 (C.A. 2); *United States* v. *Loyola*, 161 F. 2d 126, 127 (C.A. 9); *Murphy* v. *American Barge Line Co.*, 169 F. 2d 61, 63 (C.A. 3), certiorari denied, 335 U.S. 859. In the present case it was impossible for respondent to offer petitioner hospitalization because he failed to report any injury. Since he knew free hospitalization was available and did not seek it, the result is the same as if he had refused a positive offer of hospitalization.[11]

There is no conflict with the cases quoted at pages 31 and 32 of the petition. Those cases involve the question of the seaman's conduct leading to injury rather than the question of the seaman's conduct with reference to securing treatment and mitigating the amount of expenditure required for maintenance and cure *after* his injury. Moreover, this Court, noting that seamen can secure treatment at Marine hospitals, often without expense, has recognized the rule that limits recovery "to the expense of such maintenance and cure as is not at the disposal of the seaman through recourse to that service". *Calmar S. S. Corp.* v. *Taylor*, 303 U.S. 525, 531.[12]

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[11] Any other rule would make it possible for seamen to avoid prompt hospitalization and diagnosis and thus prolong, perhaps indefinitely, the duration of illness or convalescence and thereby greatly increase the burden of maintenance and cure.

[12] The contention that the decision of the court below "conflicts" with the law of Illinois with reference to the finding that there was no causal connection between the various injuries sustained by petitioner is without merit. Counsel for

3. Contrary to the contention of petitioner, the proceedings in the courts below present no departure from the usual and accepted course of judicial proceedings and there has been no denial of due process of law. Petitioner complains that he was not given a fair, impartial and speedy trial. Although the records do not so disclose, the truth of the matter is that petitioner's counsel failed to appear on the trial call of this case on January 16, 1951 and the case was placed on the passed case calendar; and that the trial, once begun, was not continued in order that respondent's counsel might go on vacation but, on the contrary, because of the heavy docket of the District Judge who was then hearing the *duPont* anti-trust case. Petitioner's counsel himself suggested the date for resumption of the trial of this matter (Tr. 76) and the trial was actually resumed a day earlier than proposed by counsel. Petitioner nowhere suggests in what way he may have been prejudiced by any delay in the trial and the record speaks for itself regarding the fairness of the trial.

Other contentions of error in the trial are equally without merit.[13] There is nothing to distinguish

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petitioner apparently uses the term "conflict" loosely in the sense that any result which he believes to be erroneous is "in conflict". The question of the causal relationship between successive injuries is purely a fact question, each case turning upon its own facts. Other suggestions of conflict contained in the petition are equally transparent, and no attempt will be made to answer these numerous contentions *seriatim*.

[13] The production of written statements of respondent's witness was not ordered because no written statements were taken from those witnesses. The records used in the cross-examination and impeachment of petitioner's medical witness were not

the method of procedure in the courts below from that generally followed in similar cases. Consequently, there was no denial of procedural due process. *Ex Parte Wall,* 107 U.S. 265, 289.[14]

Petitioner's real objection to the decision of the two courts below is that factual issues have been decided adversely to his cause. It is familiar that seamen are wards of the admiralty and that the courts are diligent to protect their rights. However, no principle of law requires the award of a judgment to which the seaman is not entitled nor excuses him from the requirement that he prove his case. Petitioner has had his day in court and the procedures obtaining therein fully comport with procedural due process.

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ordered produced because they were sent to the United States Attorney, just as Veterans Administration records are sent to United States Attorneys in other cases in which they may be relevant, in whose custody petitioner's counsel might examine them in detail prior to the trial. Both the witness and counsel conceded the authenticity of these records and no objection was made to their use (Tr. 40, 46, 48, 50). Nor did counsel object when the court was advised of their inadvertent return to the Veterans Administration before the conclusion of the trial.

[14] Petitioner also urges that respondent's depositions were improperly made a part of the record on appeal. Counsel for respondent followed the procedure established in Rule 75 of the Federal Rules of Civil Procedure, made applicable by Rule 10 of the United States Court of Appeals for the 7th Circuit, and, contrary to the present representations of counsel for petitioner, counsel was duly served with copies of the notice to correct the record on appeal and he signed a copy as having received the same. The cases cited at page 36 of the petition enjoin the raising of an issue on appeal which was not presented in the trial court. Every issue raised by respondent's cross-appeal was fully presented in the District Court.

CONCLUSION

The decision below is correct and further review is not warranted. It is respectfully submitted that the petition for writ of certiorari should be denied.

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